BC EST #D171/99
Reconsideration of BC EST #D101/98

EMPLOYMENT STANDARDS TRIBUNAL

In the matter of an application for reconsideration pursuant to Section 116 of the *Employment Standards Act* R.S.B.C. 1996, C. 113

- by -

Dusty Investments Inc. d.b.a. Honda North
("Honda North")

- of a Decision issued by -

The Employment Standards Tribunal
(the "Tribunal")

ADJUDICATORS:	David Stevenson, Chair John Orr Ib Petersen
FILE NO.:	97/873 and 98/190
DATE OF DECISION:	April 20, 1999

DECISION

BACKGROUND

On January 29, 1999, this panel issued its Decision on a reconsideration application by Dusty Investments Inc. d.b.a. Honda North ("Honda North") of Tribunal Decision BC EST #D101/98. This panel concluded that Honda North had not established that the original panel was biased, that it had made a serious mistake in applying the law, or that it had misunderstood or failed to deal with a significant issue in the appeal and dismissed the appeals based on those arguments. We said, however, in respect of an allegation by counsel for Honda North that the original panel had denied Honda North a fair hearing by not allowing them to call evidence or make full submission on a preliminary objection raised by the Director:

> On the issue of denial of fair hearing, while we have some concerns about whether the applicant was able to introduce evidence relevant to the preliminary objection and to make complete submissions on that issue, neither are we certain that the applicant was not able to do so. Our authority under Section 116 is not restricted to a purely appellate role. In appropriate circumstances, a panel of the Tribunal acting under Section 116 will adopt a broader role in order to ensure the proceedings before the Tribunal generally achieve an acceptable level of fairness. We will rehear the parties on the preliminary objection. The rehearing will proceed by way of written submissions and, if necessary, Statutory Declaration. We do not foreclose the possibility that an oral hearing may be ordered to resolve critical factual differences that might arise in the rehearing, but without seeing the factual assertions of the parties on the preliminary issue it would be premature to proceed directly to an oral hearing.

In order to efficiently administer the process contemplated by the above statement, this panel issued a number of orders and directions pursuant to our authority under Section 107 of the *Act*:

1. Honda North will be given an opportunity to make full submission on the preliminary issue, including an opportunity to explain why only some of the information was provided to the investigating delegate;

2. Any evidence that Honda North wishes to introduce in support of that submission must be provided by way of Statutory Declaration and be attached to the submission;

3. Any submission and evidence that Honda North wishes to provide to the Tribunal must be delivered to the Tribunal and to the other parties no later than 5 working days following the date of receipt of this decision;

4. The other parties will then be given an opportunity to reply to the submission of Honda North and to any Statutory Declaration received from Honda North;

5. Any reply evidence must be provided by way of Statutory Declaration and be attached to the reply submission;

6. Any reply submission and reply evidence that any other party wishes to provide to the Tribunal must be delivered to the Tribunal and to Honda North no later than 5 working days following the date of receipt of the submission of Honda North.

Honda North filed its submission on March 1, 1999 (the "preliminary objection submission"). In that submission, counsel acknowledges his understanding of the scope of the submission:

> In the Tribunal's Reconsideration Decision, the Tribunal has given Honda North an opportunity to make a submission and provide evidence in support on a very limited and narrow issue – the "preliminary issue" or the "preliminary objection".

The reason, of course, for "limiting" the submissions of the parties to that issue is that this panel found the balance of Honda North's appeal to be without merit and had already dismissed it. Notwithstanding our decision to dismiss a substantial portion of the appeal and counsel's apparent understanding of the scope of the submissions and evidence sought from Honda North, counsel has made comprehensive arguments on issues that have already been decided. We will not consider those arguments again and refer counsel to our decision of January 29, 1999 for our conclusion on them.

FACTS

It is relevant to reproduce the Reasons for Appeal filed by Honda North in respect of the Determination made on November 24, 1997:

> **C. REASONS FOR THIS APPEAL**
>
> 1. The Determination was wrong as the Employer, Honda North, was unable to provide the information in the time period requested as the Employer, Honda North's bookkeeper/accountant was:
>
> (a) firstly, was sick;
> (b) secondly, had to prepare accounting updates to finalize year end;
> (c) thirdly, had to travel to England where her father was severely ill immediately after preparing (b);
> (d) only returned from England on November 10, 1997.
>
> The Employer, Honda North, realizes it should have responded in writing setting out this problem, however, the key person to provide that information was just not available.
>
> 2/3. The reasons for making the appeals are as follows:
>
> (a) the Employee was told repeatedly that he was not to work beyond 40 hours per week. Also, any overtime worked would require prior authorization and no prior authorization was given.
> (b) the Employer did not start business until 7:30 a.m., therefore, it was not necessary for the Employee to be at work at 7:00 a.m.;
> (c) no one authorized the Employee to work beyond 8 hours as can be seen by the unsigned time sheets presented to the Employer.
> (d) the Employee took sick days off, without backup medical reports;
> (e) the Employee failed to compensate the Employer for a motor vehicle he was unauthorized to drive and which he demolished.
>
> 4. The Employer wishes the Determination to pay the Employee $12,991.71 be reversed.

The Reasons for Appeal were prepared by counsel for Honda North in accordance with the instructions contained on the form required to be used when filing an appeal with the Tribunal. The instructions state:

> To comply with the Tribunal's rules and the *Employment Standards Act*, you must do all of the following on a separate sheet:
>
> 1. State why the Determination is wrong;
> 2. Give clear reasons why you are making this appeal;
> 3. State clearly what facts are in dispute; and
> 4. State clearly what remedy you are seeking from the Tribunal.

The appeal was accompanied by a substantial number of employer records relating to wages and hours of work for the employee, Christopher Downey ("Downey"). The appeal was received by the Tribunal on December 1, 1997 and the cover letter from counsel for Honda North was dated November 28, 1997. According to the material on file, the Determination was delivered to Honda North on November 24, 1997. It is safe to conclude that the employer records the Director could not obtain in 13 weeks and six communications with Honda North, including a formal Demand for Employer Records, were provided to counsel for Honda North less than four days following the Determination for the purposes of filing an appeal.

It is against that backdrop the preliminary issue arose before the original panel.

ANALYSIS

In filing his submission to this Panel, counsel for Honda North states:

> As Honda North understands it, the "preliminary issue" or "preliminary objection" referred to by the Tribunal goes to whether or not Honda North received a fair hearing in accordance with the principles of natural justice and whether Honda North should be allowed to introduce evidence at the Tribunal level which it did not provide to the delegate of the Director of Employment Standards at the investigation stage.

The above paragraph overstates the preliminary issue, which was concisely framed in the original decision as follows:

> **ISSUES TO BE DECIDED**
>
> Honda North failed to participate in the Director's investigation except to provide some records which were conceded to be *"limited and not what were requested"* by the delegate of the Director. Is Honda North entitled to introduce evidence in appeal that it refused to provide to the Director during the investigation?

What concerned this panel in dealing with the reconsideration of the original panel's decision is stated in the following passage from our January 29, 1999 decision:

> . . . counsel says:
>
> > . . . Adjudicator Suhr would not let the applicant fully explain and call complete evidence as to why only some of the information was provided. He also would not let the applicant fully develop an argument relating to the jurisdiction of the Director's delegate . . .
>
> . . . there is nothing in the submissions from counsel for Honda North indicating what additional facts or factors would have been introduced to add support to the argument that Honda North should be relieved from its failure to provide the documents requested by the Director. In most cases it would be inappropriate for an applicant to simply assert that they were not allowed to "fully explain or call complete evidence". Such an assertion is purely subjective. It may reflect nothing more than a disagreement with a conclusion by the Adjudicator that certain evidence sought to be led or certain arguments sought to be made were either unnecessary or irrelevant to the issues being addressed.

Counsel for Honda North said in the reconsideration submissions that he was prepared "to fully explain and call complete evidence as to why only some of the information was provided" at the hearing before the original panel but was never given the opportunity. The very clear inference left by counsel was that Honda North had an explanation for its failure or refusal to respond to the Demand made by the Director and had evidence and argument in support of that explanation which it could provide it if given the opportunity to do so. That opportunity has been provided by this panel in its January 29, 1999 decision and Honda North has responded.

This panel will now address the preliminary objection submission filed by counsel for Honda North. The submission is developed under three headings and we shall deal with each in turn.

1. Hearing Held by the Tribunal on February 24, 1998

The first point made by counsel for Honda North under this heading is found in the following comment:

> . . . Honda North had a reasonable and legitimate expectation that it would be given a chance to tell its side of the story at the hearing and explain why it was unable to fully comply with the request for records at the investigation stage. Unfortunately, Honda North was not provided with that opportunity.

That comment only begs the question of what facts or factors was Honda North not given the opportunity to submit to the original panel. It also simply restates the basis upon which this panel has revisited the preliminary issue.

The next point made by counsel for Honda North is that the original panel may have been moved to decide the issue differently if he had taken the time to hear the evidence and argument at the original hearing, but:

> Unfortunately, to the detriment of Honda North, [the adjudicator] did not take advantage of the opportunity to allow Diane Ross to provide an explanation. Dianne Ross is now unable to provide such information to the Tribunal and as a result of the Tribunal's actions, Honda North is now prejudiced.

In support of his assertion that Dianne Ross is now unable to provide the explanation it intended to give to the original panel, counsel for Honda North has filed the Statutory Declaration of David Fanshaw, General Manager of Honda North. The relevant provisions of the Statutory Declaration declare as follows:

> 33. THAT the company's bookkeeper/accountant, Dianne Ross, left the employment of the company in June, 1998.
>
> 34. THAT I am informed by our counsel, John K. Dungate and verily believe that he contacted Dianne Ross by telephone on February 24, 1999 with regards to obtaining information and detail regarding this matter, and that she said she would consider whether she would cooperate after consultation with her husband that evening. Attached

hereto as Annexure "A" is a true copy of the fax sent to Dianne Ross by John K. Dungate on February 24, 1999.

35. THAT on February 25, 1999, I spoke with Dianne Ross and she confirmed that she had received the fax from John K. Dungate and I requested she provide the information to John K. Dungate.

36. THAT on February 26, 1999, I called Dianne Ross at her home telephone number and left a message on her answering machine asking her to provide the information to John K. Dungate.

37. THAT I am informed by John K. Dungate and verily believe that at 4:50 p.m. Friday, February 26, 1999, he did receive a telephone call from Dianne Ross who advised that she would like to help however she could not remember dates and details due to the passage of time.

The fax referred to in paragraph 34 says, in part:

> A three member panel of the Employment Standards Tribunal has now given Dusty Investments Inc. dba Honda North the opportunity to make a written submission and to provide evidence by way of sworn statutory declaration(s) as to why only some of the records requested by the delegate of the Director of Employment Standards were provided.
>
> With this in mind, we ask you to provide us with the following information with the view to our preparing a statutory declaration for your review and swearing:
>
> 1. Between what dates were you on holiday during the period August 1997 to November 1997?
>
> 2. Between what dates were you working on the year end statements for Honda North during the period August 1997 and November 1997?
>
> 3. Between what dates were you in England with your father who was ill during the period August 1997 and November 1997?
>
> 4. Whether Honda North was ever provided with the records submitted by Mr. Downey to the Employment Standards Branch prior to the November 24, 1997 determination being made?

5. When this matter first came to your attention?

6. When you first became aware of the full extent of the monetary claim of Mr. Downey?

7. Any other information you feel may be of assistance.

We have two problems with this aspect of the submission from Honda North. First, Paragraph 37 of the Statutory Declaration of Mr. Fanshaw is hearsay. It is, in fact, hearsay once removed. If, as Mr. Fanshaw says in his Statutory Declaration, Ms. Ross would like to have helped, there is no valid explanation why she was not able to say for herself that she was unable to remember "dates and details" due to the passage of time. Second, none of the seven questions asked by counsel for Honda North raise any new element to the position of Honda or identify any evidence or argument that was not already made or available to the original panel from the record.

In fact, the information requested of Ms. Ross in paragraphs 1 and 3 could easily have been obtained by Honda North through an review of their own records. Under paragraph 28(1)(d) of the *Act* Honda North was required to keep a record of the Hours worked by Ms. Ross each day and paragraph 28(1)(i) required them to keep a record of the dates of the annual vacation taken by Ms. Ross. Notwithstanding those requirements, the record indicates that Ms. Ross was at work on September 23, 1997, and told the investigating officer she had "just returned from vacation"; was at work on October 3, 1997, and told the investigating officer she "had just finished year end" (at which time she also promised to deliver the records that day); and was at work on October 6, 1997, when she again promised to deliver the records to the investigating officer.

The second question asked by counsel for Honda North is also answered in the materials. Ms. Ross was for the purpose of the preliminary issue, doing the year end between September 23, 1997 and October 3, 1997, when she told the investigating officer she had just finished it.

The fourth and sixth paragraphs do not address considerations that are relevant to the preliminary issue. There is no requirement for the Director to provide either a complaint, the information upon which a complaint is based or the extent of the monetary claim made by the individual before commencing an investigation under Section 76 of the *Act*. The extent to which the Director must provide the object of an investigation under the *Act* with the material or information upon which such an investigation is commenced was addressed by the Tribunal in *Jack Verburg operating Sicamous Bobcat and Excavating*, BC EST #D418/98, and the Tribunal noted:

The basic premise of the position taken by Verburg is that an employer is not required to respond to a Demand for Employer Records in the context of an investigation under the *Act* unless the Director provides proof, satisfactory to the employer, of the allegation giving rise to the demand. That premise is wrong. The authority of the Director to demand production of records is not dependent upon the existence of a complaint. Rather, it is part of the statutory mandate of the Director to ensure compliance with the *Act* and the *Regulation*. Subsection 85(1) of the *Act* authorizes the Director to require production of any records. The relevant portions of that subsection read:

> *85. (1) For the purpose of ensuring compliance with this Act and the regulations, the director may do one or more of the following:*
>
> . . .
>
> *(c) inspect any records that may be relevant to an investigation under this Part;*
>
> . . .
>
> *(f) require a person to produce, or to deliver to a place specified by the director, any records for inspection under paragraph (c).*

There are two matters of note in the above provision. First, the authority to inspect applies to *any* records that *may* be relevant. A determination of the relevance of records sought by the Director to be inspected does not have to be established before inspection is allowed. And most certainly, it does not depend on the perception of the person to whom the demand is made of the relevance of the records sought to be inspected. Second, the authority to require production is associated with "an investigation" under Part 10 of the *Act*. An investigation under the *Act* does not depend either on a complaint or proof of a contravention of the *Act*.

Subsection 76(1) requires the Director to investigate, subject to the discretion given the Director in subsection 76(2), if a complaint is made under Section 74. Subsection 76(3) authorizes the Director to conduct an investigation without a complaint:

> *76.(3) Without receiving a complaint, the director may conduct an investigation to ensure compliance with this Act.*

The role of the Director under subsections 76(1) or 76(3) is investigative. There is no requirement on the Director to validate the legitimacy of a complaint at this stage of a proceeding. The entire purpose of an investigation is

> to determine whether a complaint is valid. The legislature has decided, for the purpose of facilitating one of the objectives of the *Act*, to efficiently resolve disputes arising under the *Act*, persons who have information that may be relevant to an investigation are required to produce and deliver it on demand. A demand must be *bona fide* and not arbitrary, but assuming it is validly issued, Section 46 of the *Regulation* imposes a statutory duty on a person to whom a demand has been issued:
>
> *46. A person who is required under subsection 85(1)(f) of the Act to produce or deliver records to the director must produce or deliver the records as and when required.*

We note that Honda North was provided with the relevant statutory provisions at the time the Demand for Employer Records was delivered.

The fifth paragraph, to the extent it may be relevant to the preliminary issue, requests information that is apparent on the record and has never been disputed by Honda North. The investigating officer delivered a formal demand by registered mail to Honda North on August 20, 1997. The signature accepting receipt of the demand on August 22, 1997 looks remarkably similar to the signature of Mr. Fanshaw on his Statutory Declaration. Even if Ms. Ross never became aware of the "matter" until the first telephone call from the investigating officer on September 23, 1997, that does not assist Honda North on the preliminary issue.

The seventh paragraph, a request from Ms. Ross for "any other information that you feel may be of assistance", simply says, in effect, that counsel for Honda North is not, and was not at the time of the hearing before the original panel, aware of any other information from Ms. Ross to support his case on the preliminary issue.

In sum, no prejudice has been shown to Honda North by the purported failure of Ms. Ross to remember "dates and details". The "dates and details" Ms. Ross is unable to remember are apparent on the record, irrelevant or within the knowledge of Honda North. This panel also agrees with the comment from counsel for the Director, who states:

> Furthermore, Honda North has not explained why it made no effort to preserve this apparently critical evidence, which is relevant to an issue *it* raised in its appeal on November 24, 1997.

It is even more perplexing that counsel for Honda North was not able to assist Ms. Ross in recollecting the "dates and details", if, as he suggests, Honda North appeared at the hearing

before the original panel prepared to have Ms. Ross provide a full explanation and give evidence to support that explanation.

In paragraph 22 of his Statutory Declaration, Mr. Fanshaw attempts to suggest why Ms. Ross may have been unable to provide the records requested by the Director in the time period allowed. There are four reasons for rejecting those suggestions. First, they are entirely speculative. At no time during the attempts by the investigating officer to secure the records from Ms. Ross did she say she was confused or misled and, of course, she has filed no Statutory Declaration to that effect in this process. Second, they have never been raised in any previous submission filed by Honda North and are unsupported by any material on file. Honda North has never appealed the $500.00 penalty imposed by the Director for contravening Section 46 of the *Regulation*. In fact, in his reconsideration application, counsel for Honda North concedes the issuance of the penalty determination was a legitimate exercise of the Director's jurisdiction under the *Act*. Mr. Fanshaw now says the manner in which the Demand was delivered to Honda North was "unfair", the Demand was "confusing" and the letter accompanying the Demand (although Mr. Fanshaw claims he was unaware of it) was "misleading". We do not accept any of that. Third, Honda North was able to produce the records to their legal counsel for the purposes of an appeal within 4 days following the Determination. Even accepting Ms. Ross was unavailable to attend to the Demand before September 23, 1997, she was at work from that date until at least October 7, 1997, a period of 14 days. Apart from her first conversation with the investigating officer, on September 23, 1997, there was no indication in any discussion she had with him that she could not assemble the records within the time allowed. The investigating officer had extended the date shown on the Demand to September 30, 1997 following that conversation. And fourth, the statutory provisions accompanying the Demand, even for a layperson, clearly convey what is required to be produced.

The burden in this matter is on Honda North to show some reason why the Tribunal should allow it to challenge the conclusions reached in the Determination with documents it failed or refused to provide during the investigation by the Director. The only reasons provided are those that are listed in the Appeal. Those reasons are not sufficient. On the evidence before us, there are no facts and circumstances that would justify the Tribunal relaxing its approach in cases such as this, where an appellant seeks to challenge conclusions of fact in the Determination with material that it failed or refused to produce during the investigation.

That approach is stated in several cases that have come to the Tribunal, including *Tri-West Tractor Ltd.*, BC EST #D268/96 and *Kaiser Stables Ltd.*, BC EST #D058/97. There are sound policy reasons for limiting the material before the Tribunal in an appeal to what has been disclosed during the investigation, unless there is a valid reason shown for allowing additional

material to be submitted. Those reasons are grounded in the purposes and objects of the *Act*. Section 2 of the *Act* states, in part:

> *2. The purposes of this Act are to*
>
> *(d) provide fair and efficient procedures for resolving disputes over the application and interpretation of this Act*

An approach that, in effect, treats appeals to the Tribunal as a trial *de novo*, where the parties are free to ignore the statutory requirements to disclose information during an investigation and add any material to the appeal is not consistent with the above stated purpose (see also *World Project Management Inc. et al*, BC EST #D134/97).

Additionally, the Tribunal is not intended to be the decision maker of first instance under the *Act* and it is not the function of the Tribunal to investigate complaints. That authority is given by the *Act* exclusively to the Director under Part 10. As this case clearly demonstrates, the investigative role of the Director is frequently adversarial. One of the primary objectives of the *Act* is to establish and maintain the Tribunal as an adjudicative body independent of the Branch and of the authority, duties and responsibilities of the Director outlined in Parts 10 and 11 of the *Act*. An approach that avoids compromising the statutory function of the Tribunal and its impartiality as an adjudicative body is consistent with that objective.

2. Investigation and Determination by the Employment Standards Branch

The arguments raised by counsel for Honda North under this heading are new. The essence of the argument is contained in the following sentence:

> It is respectfully submitted that the Director breached section 77 of the Act and one of the fundamental principles of natural justice – the right to know the full case made against it and the opportunity to respond.

This argument is without merit. A complete answer to it has been provided above in the reference from *Jack Verburg operating Sicamous Bobcat and Excavating* (see also *Insulpro Industries Inc. and Insulpro (Hub City) Ltd.*, BC EST #D405/98). The *Act* does not require the Director to provide particulars of the complaint to the object of an investigation. Honda North was notified of the fact that Downey had filed a complaint claiming entitlement to wages. Documents related to the complaint were sent to the business address of Honda North by certified mail and, as indicated earlier, were accepted by a person at that business address whose signature bears a remarkable similarity to Mr. Fanshaw's signature. Also, the Director,

through the investigating officer, made more than reasonable efforts to provide Honda North with an opportunity to respond.

3. Other Issues.

This issue has already been addressed in our January 29, 1999 decision and will not be revisited here.

CONCLUSION

None of the matters considered by this panel require a further oral hearing. Honda North has not established any circumstances that would persuade this panel to allow it to introduce evidence in the appeal that it failed or refused to provide to the Director during the investigation.

ORDER

Pursuant to Section 116 of the *Act*, this panel refuses the reconsideration application. The order of the original panel stands unchanged.

David Stevenson
Adjudicator
Employment Standards Tribunal

John Orr
Adjudicator
Employment Standards Tribunal

Ib Petersen
Adjudicator
Employment Standards Tribunal